BRB No. 09-0724 BLA

JAMES HOMER McCALLA (deceased)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 08/18/2010
	)	
and	)	
	)	
PEABODY INVESTMENTS INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Darrell Dunham (Darrell Dunham & Associates), Carbondale, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2007-BLA-05895) of Administrative Law Judge Jeffrey Tureck with respect to a subsequent claim filed on June 28, 2006,[1] pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge credited claimant with at least twenty-seven years of qualifying coal mine employment, and adjudicated this claim pursuant to 20 C.F.R. Part 718. Weighing the medical evidence submitted since the prior denial, the administrative law judge found the evidence insufficient to establish the existence of either clinical or legal pneumoconiosis[2] pursuant to 20 C.F.R. §718.202(a) and insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b).[3] Consequently, the administrative law judge found

[1] Claimant filed his initial claim on February 5, 1993, which was denied by the district director on May 19, 1993 because no elements of entitlement were established. Director's Exhibit 1. No further action was taken until claimant filed a second claim on July 21, 1999, which was also denied by the district director because claimant failed to establish any of the requisite elements of entitlement. Director's Exhibit 2. No further action was taken on this claim. Claimant filed his current claim on June 28, 2006. Director's Exhibit 4. Claimant died on December 22, 2008, prior to the issuance of the Decision and Order Denying Benefits dated June 9, 2009, which is now before us on appeal.

[2] Clinical pneumoconiosis consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201(a)(1). Under the terms of 20 C.F.R. §718.201(a)(2), legal pneumoconiosis is defined as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[3] Because the administrative law judge found that pneumoconiosis was not established at 20 C.F.R. §718.202(a), he found that claimant could not establish that pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). Further, although not addressed by the administrative law judge, because total respiratory

that claimant failed to establish a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the newly submitted medical evidence failed to establish pneumoconiosis pursuant to Section 718.202(a)(4) and total respiratory disability at Section 718.204(b)(2)(iv). Claimant also contends that the evidence establishes that claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b) and that claimant's total respiratory disability is due to pneumoconiosis at 20 C.F.R. §718.204(c). In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that he will not submit a formal response to claimant's appeal unless requested to do so by the Board.[4]

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[5] which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

By Order dated May 12, 2010, the Board provided the parties with the opportunity to address the impact, if any, of the 2010 amendments on this case. *McCalla v. Peabody Coal Co.*, BRB No. 09-0724 BLA (May 12, 2010)(unpub. Order). The Director and employer have responded. The Director states that, if the Board affirms the administrative law judge's finding that claimant failed to establish total disability, it may

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disability was not established at 20 C.F.R. §718.204(b), disability due to pneumoconiosis cannot be established at 20 C.F.R. §718.204(c).

[4] The administrative law judge's findings that claimant had at least twenty-seven years of coal mine employment, and that the newly submitted evidence failed to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) and total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), are affirmed, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] The 2010 amendments to the Act also provided that a qualified survivor of a miner who filed a successful claim for benefits, is automatically entitled to survivor's benefits, without the burden of establishing entitlement. *See* 30 U.S.C. §932(*l*).

affirm the denial of benefits without regard to the Section 411(c)(4) presumption, because invocation of the Section 411(c)(4) presumption is dependent upon claimant establishing a totally disabling respiratory impairment. Director's Supplemental Letter Brief at 2. However, the Director maintains that, if the Board does not affirm the administrative law judge's finding regarding total respiratory disability, the case must be remanded for the administrative law judge to consider entitlement pursuant to the Section 411(c)(4) presumption. If the case is remanded for consideration under Section 411(c)(4), the Director states that the administrative law judge should allow the parties to proffer additional evidence consistent with the evidentiary limitations set forth in 20 C.F.R. §725.414, or upon a showing of good cause under 20 C.F.R. §725.456. *Id*. Employer responds that, if the Board affirms the administrative law judge's decision, then the 2010 amendments do not affect the disposition of this case. Employer's Supplemental Letter Brief at 1. Employer states, however, that, if the administrative law judge's decision is not affirmed, then due process dictates that the case should be remanded to the district director in order to provide the parties with the opportunity to respond to the changes in the law. *Id*.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he did not

[6] As claimant's coal mine employment was in Illinois, the law of the United States Court of Appeals for the Seventh Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 5, 9.

establish that he suffered from pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibits 1, 2. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing either that he suffered from pneumoconiosis or that he was totally disabled. 20 C.F.R. §725.309(d)(2), (3).

Clinical and Legal Pneumoconiosis

After consideration of the administrative law judge's Decision and Order, the issues raised on appeal and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. Pursuant to Section 718.202(a)(4), the administrative law judge considered two CT scan interpretations, the medical opinions of Drs. Istanbouly, Repsher and Rosenberg, and numerous treatment and hospitalization records. Initially, the administrative law judge found that neither the reading of the January 22, 2007 CT scan by Dr. Wiot nor the reading of the September 8, 2007 CT scan by Dr. Maxey, established pneumoconiosis. Decision and Order at 4; Claimant's Exhibit 2; Employer's Exhibit 15.

With respect to the newly submitted medical opinions, the administrative law judge found that the opinion of Dr. Istanbouly, which diagnosed both clinical and legal pneumoconiosis, was entitled to no weight because the physician was not a credible witness at the hearing and did not provide a credible explanation "for diagnosing clinical [and] legal pneumoconiosis rather than other, non-coal mine related lung conditions." Decision and Order at 5; Director's Exhibit 15; Hearing Transcript 18-93. In contrast, the administrative law judge accorded greater weight to the opinion of Dr. Repsher, that claimant does not suffer from either clinical or legal pneumoconiosis. The administrative law judge found that Dr. Repsher's opinion was very detailed and well explained and that it was supported by most, if not all, the evidence of record. Decision and Order at 6, 7; Director's Exhibit 16; Employer's Exhibit 19. In addition, the administrative law judge found Dr. Repsher's opinion supported by the opinion of Dr. Rosenberg, which was based on a review of the medical evidence of record. Decision and Order at 7; Employer's Exhibits 11, 20. The administrative law judge further noted that the record contained voluminous medical records from several hospitals and medical centers, including the treatment notes of Dr. Griffin, the miner's primary care physician. Decision and Order at 7. However, the administrative law judge found that, while these records chronicled claimant's years of treatment for "cardiopulmonary illnesses, as well as the diagnosis and treatment of his sleep apnea and weight gain," they did not contain a "reasoned medical opinion diagnosing pneumoconiosis," as defined by the Act. *See* 20 C.F.R. §§718.201; 718.104(d)(5); *Id*. Consequently, the administrative law judge found that, based on the newly submitted medical opinion evidence, claimant failed to establish the existence of either clinical or legal pneumoconiosis at Section 718.202(a)(4). *Id*.

Claimant, in challenging the administrative law judge's finding that the evidence failed to establish either clinical or legal pneumoconiosis at Section 718.202(a)(4), contends that the administrative law judge erred in weighing the medical opinion evidence and in failing to consider all of the relevant medical evidence. Claimant argues that the opinion of Dr. Istanbouly, in which the physician opined that claimant suffered from both clinical and legal pneumoconiosis, is better reasoned than the other medical opinions, and that the administrative law judge erred in according no weight to this opinion. Specifically, claimant argues that the administrative law judge failed to explain why the opinions of Drs. Rosenberg and Repsher were more "reasonable and rational" than that of Dr. Istanbouly. Claimant's Brief at 12, 16. Claimant further contends that the administrative law judge did not consider all of the medical evidence, arguing that the administrative law judge did not consider that two of the miner's treating physicians diagnosed coal workers' pneumoconiosis and that the administrative law judge could have accorded these opinions greater weight. *Id*. at 13.

Claimant also notes that the evidence need not show that coal dust exposure was the only cause of the respiratory impairment to establish legal pneumoconiosis. Rather, claimant contends that it is sufficient to show that claimant's respiratory impairment was due, at least in part, to coal dust exposure and, therefore, because the miner had a twenty-seven year employment history, claimant's coal dust exposure contributed, at least in part, to his respiratory impairment. *Id*. at 14.

Contrary to claimant's contention, the administrative law judge provided a rational discussion of the relevant medical evidence, and specifically found that Dr. Istanbouly's opinion, diagnosing both clinical and legal pneumoconiosis, was not credible and he accorded it no weight. Decision and Order at 5-6. The administrative law judge, within a reasonable exercise of his discretion as trier-of-fact, found that Dr. Istanbouly was not a credible witness as he "frequently contradicted himself … showed a general lack of familiarity with the Miner's medical and coal dust exposure histories … and did not display the confidence in his conclusions that would be expected of a medical expert." *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-9, 22 BLR 2-311, 2-318 (7th Cir. 2001); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989)(*en banc*); *see Zeigler Coal Co. v. Director, OWCP* [*Villain*], 312 F.3d 332, 336, 22 BLR 2-581, 2-589 (7th Cir. 2002); *Amax Coal Co. v. Burns*, 855 F.2d 499 (7th Cir. 1988) (it is the duty of the administrative law judge to weigh the evidence, draw inferences and determine credibility); Decision and Order at 5 [citations omitted]. The administrative law judge also reasonably exercised his discretion in finding that Dr. Istanbouly's conclusions were not supported by their underlying documentation. *McCandless*, 255 F.3d at 468-9, 22 BLR at 2-318; *Clark*, 12 BLR at 1-155; Decision and Order at 5.

Additionally, contrary to claimant's contention, the administrative law judge considered all of the relevant evidence, including the hospital records and treatment

records from the miner's physicians, including Dr. Griffin, the miner's primary care physician, and properly accorded this evidence little weight, based on his determination that these medical records did not contain "a reasoned medical diagnosis of pneumoconiosis." *See* 20 C.F.R. §§718.201; 718.104(d)(5); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *Migliorini v. Director, OWCP*, 898 F.2d 1292, 13 BLR 2-418 (7th Cir. 1990); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 7. Considering the relevant evidence, the administrative law judge reasonably found that the opinion of Dr. Istanbouly and the notations in the treatment records were insufficient to establish either clinical or legal pneumoconiosis. Thus, error, if any, in the administrative law judge's weighing of the contrary evidence is harmless because claimant has failed to carry his burden of proving either clinical or legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Moreover, contrary to claimant's contention, the existence of a respiratory impairment, along with twenty-seven years of coal mine employment, does not establish a relationship between the two, and does not, therefore, establish legal pneumoconiosis. Rather, in order to establish legal pneumoconiosis, claimant must affirmatively establish the relationship between his respiratory impairment and his coal mine employment. *See* 20 C.F.R. §718.201.

Consequently, we affirm the administrative law judge's finding that the evidence fails to establish either clinical or legal pneumoconiosis at Section 718.202(a)(4), as within a reasonable exercise of his discretion. 20 C.F.R. §§718.201, 718.202(a)(4); *McCandless*, 255 F.3d at 468-9, 22 BLR at 2-318; *Migliorini*, 898 F.2d at 1295, 13 BLR at 2-423; *Clark*, 12 BLR at 1-155. The administrative law judge's finding that neither clinical or legal pneumoconiosis is established at Section 718.202(a) is, therefore, affirmed.

Total Respiratory Disability

Pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that the newly submitted evidence was insufficient to establish total respiratory disability. In particular, the administrative law judge found that none of the pulmonary function studies or blood gas studies administered since the prior denial yielded qualifying results. 20 C.F.R. §718.204(b)(2)(i), (ii); Decision and Order at 5-6, 7; Director's Exhibits 15, 16; Employer's Exhibit 14. The administrative law judge also found that there was no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 7. With regard to the newly submitted medical opinions, the administrative law judge found that Dr. Istanbouly's diagnosis of total respiratory disability was not credible, as it was not supported by its underlying

documentation. Decision and Order at 8; Director's Exhibit 15; Hearing Transcript at 18-93. In addition, the administrative law judge found that, although Drs. Repsher and Rosenberg opined that the miner was "incapable of performing his previous coal mine work," they opined that "his pulmonary condition would not prevent him from doing so." Decision and Order at 8. Consequently, the administrative law judge found that the medical opinion evidence submitted since the prior denial was insufficient to establish total respiratory disability at Section 718.204(b)(2)(iv). *Id*.

In challenging the administrative law judge's finding, claimant fails to allege any specific error made by the administrative law judge in his consideration of the medical opinion evidence relevant to total respiratory disability at Section 718.204(b)(2)(iv). Claimant merely states that Dr. Istanbouly opined that the miner was not capable, from a pulmonary standpoint, of performing his last coal mining job, while Drs. Repsher and Rosenberg, agreeing that claimant was not able to perform his usual coal mine employment, attributed the disability to non-respiratory factors. Claimant's Brief at 17. Specifically, claimant states:

> If the court were to find that Claimant does have CWP, it would seem to follow that the agreed upon disability was caused in part because of CWP. There is, therefore, no dispute as to disability.

Claimant's Brief at 17-18. Because claimant has not raised a specific error with regard to the administrative law judge's finding on total respiratory disability at Section 718.204(b), we affirm the administrative law judge's finding that claimant has not carried his burden of establishing total respiratory disability at Section 718.204(b), by medical evidence submitted since the prior denial. 20 C.F.R. §802.211(b); s*ee Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); *see also Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984).

Because we affirm the administrative law judge's determination that the new evidence failed to establish pneumoconiosis pursuant to Section 718.202(a), or total respiratory disability pursuant to Section 718.204(b), claimant has failed to demonstrate that one of the applicable conditions of entitlement has changed since the denial of his prior claim pursuant to Section 725.309.[7] *See* 20 C.F.R. §725.309(d); *White*, 23 BLR at

[7] Because we affirm the administrative law judge's findings that pneumoconiosis was not established and that total respiratory disability was not established by the newly submitted evidence at 20 C.F.R. §§718.202(a) and 718.204(b), we need not address claimant's arguments regarding the cause of pneumoconiosis and the cause of total respiratory disability at 20 C.F.R. §§718.203(b) and 718.204(c).

1-7. Further, because we affirm the administrative law judge's finding that claimant has not established total respiratory disability at Section 718.204(b), claimant is not entitled to consideration of his claim under Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4). Entitlement to benefits in this case is, therefore, precluded.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge